IN THE FLORIDA SUPREME COURT
CASE NO. SC03-482

DANIEL JON PETERKA, *Petitioner*

v.

JAMES V. CROSBY, *Respondent.*

AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James V. Crosby, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Peterka was represented on direct appeal by Assistant Public Defender David Davis. He raised twelve issues in the direct appeal: 1) excusing for cause prospective juror Piccorossi because of his personal opposition to the death penalty; 2) denying Peterka's motion to suppress his statements to the police; 3) denying

Peterka's motion for judgment of acquittal based upon insufficient evidence of premeditation; 4) admitting hearsay evidence that Peterka had fled Nebraska and was considered "armed and dangerous"; 5) admitting testimony that the victim suspected Peterka of stealing the money order and that the victim intended to let the police handle the matter; 6) admitting into evidence a photograph of the victim's skull; 7) entering a sentencing order that lacked clarity; 8) finding the aggravating factor that the homicide was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; 9) finding that the murder was committed for pecuniary gain; 10) referring to other "mitigating circumstances" in the sentencing order without stating what they were or why they did not amount to mitigation as required by *Campbell v. State*, 571 So.2d 415 (Fla. 1990); 11) allowing the State, during cross-examination of Peterka's mother at the penalty phase, to allege that Peterka had an extensive juvenile record; and 12) partially denying Peterka's motion to suppress his statements because he repeatedly asked for assistance of counsel, which law enforcement ignored. *Peterka*, 640 So.2d at 65.

Appellate counsel, a board certified criminal appellate specialist who was admitted to the Florida Bar in 1979, wrote a 65 page initial brief raising eleven issues. Appellate counsel also filed a supplemental initial brief raising a twelfth issue. Appellate counsel then wrote a 41 page reply brief further addressing ten of the twelve

issues.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Rutherford* Court explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *See also Freeman v. State*, 761 So.2d 1055 (Fla. 2000). Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). A habeas petitioner cannot establish prejudice unless the issue was a "dead bang winner". *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999)(explaining that appellate counsel's performance is only deficient and prejudicial if counsel fails to argue a "dead-bang winner"). Petitioner

must show that he would have won a reversal from this Court had the issue been raised.

ISSUE I

IS *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) RETROACTIVE?

Peterka contends that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The State respectfully disagrees. First, *Ring* is not retroactive. Three state supreme courts have held *Ring* is not retroactive. Moreover, numerous courts, including federal circuit courts, state supreme courts and two Florida district courts have held that *Apprendi*, which was the precursor to *Ring*, is not retroactive. *Ring* involves only half of an *Apprendi* error. So, if *Apprendi* does not warrant retroactive application, *Ring* cannot. Furthermore, this Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in both direct appeals and collateral review.[1]

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[1] To the extent that Peterka is raising an ineffective assistance of appellate counsel claim for failing to raise a *Ring* claim in the direct appeal, the ineffectiveness claim must fail. Appellate counsel was not ineffective for failing to raise a Sixth Amendment right to jury trial challenge to judge-based capital sentencing because there was United States Supreme Court precedent directly contrary to that position. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Indeed, the United States Supreme Court reaffirmed *Walton* in 2000, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). It was not until 2002 in *Ring* that the United States Supreme Court overruled *Walton*. Appellate counsel is not ineffective for failing to raise an issue with controlling precedent directly against the claim. Nor is appellate counsel ineffective for failing to

RETROACTIVITY

Neither *Ring*, nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are retroactive. Both *Apprendi* and *Ring* are rules of procedure, not substantive law. They both concern who decides a fact, *i.e.,* the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt) and explaining that *Apprendi* did not alter which facts have what legal significance). New procedural rules are not applied retroactively.[2]

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anticipate a change in law. *State v. Lewis*, 838 So.2d 1102, 1122 (Fla. 2002)(rejecting an ineffective assistance of appellate counsel claim for failing to raise an *Apprendi* challenge citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992)(stating defense counsel cannot be held ineffective for failing to anticipate the change in the law)). This Court has rejected similar ineffective assistance of appellate counsel claims in the wake of *Ring*. *Cole v. State*, 841 So.2d 409, 429-430 (Fla. 2003)(rejecting an ineffectiveness of appellate counsel claim for failing to raise a constitutional challenge to Florida's death penalty statute based on *Apprendi*). However, Peterka seems to be raising a straight *Ring* claim, which is not proper in a state habeas petition.

[2] Florida uses the old constitutional test for retroactivity rather that the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Witt v. State*, 387 So.2d 922 (Fla. 1980). Florida courts should also adopt the *Teague* test for retroactivity. The *Witt* test of retroactivity was based on two United States Supreme Court cases

According to the federal test of retroactivity, *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), only "watershed" rules of criminal procedure

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dealing with retroactivity, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), *and Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The United States Supreme Court no longer uses these tests for determining retroactivity on collateral review because, as the *Teague* Court observed, the old *Linkletter/Stovall* test led to inconsistent results and disparate treatment of similarly situated defendants. *Teague*, 489 U.S. at 302-303. Both the Arizona and New Hampshire Supreme Court have adopted *Teague* for the pragmatic reason that the law regarding retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity tests. *State v. Tallard*, 816 A.2d 977, 980 (N.H. 2003); *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991). Morever, *Witt* raises serious due process concerns. One of the prongs of *Witt* is that the new rule is constitutional in nature, implying that changes in the interpretation of a statute are automatically not retroactive, but it is changes in the meaning of the statute that raise legal innocence problems. *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828, (1998)(noting that *Teague* applies to procedural rules, not when courts decide the meaning of a criminal statute and explaining that decisions involving a substantive federal criminal statute which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" citing *Davis v. United States*, 417 U.S. 333, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974)). Any state with a retroactivity test which lacks a substantive/procedural distinction runs the risk of violating due process, just as the Pennsylvania Supreme Court did in *Fiore v. White*, 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999)(applying, in a habeas petition from a state conviction, a due process insufficiency of the evidence analysis when the element of the crime changed); *see also Bunkley v. Florida*, 2003 WL 21210417 (May 27,2003)(remanding for reconsideration of a retroactivity issue where this Court employed the *Witt* test). Despite the canard about states being free to adopt any test of retroactivity, states without the equivalent of a substantive retroactivity test will encounter due process problems. Florida should adopt *Teague* to avoid these concerns.

which (1) greatly affect the accuracy and (2) alter understanding of the bedrock procedural elements essential to the fairness of a proceeding are applied retroactively. *Sawyer v. Smith*, 497 U.S. 227, 242, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990)).[3]

Ring does not enhance the accuracy of the conviction or involve a bedrock procedural element essential to the fundamental fairness of a proceeding. Only those rules that seriously enhance accuracy are applied retroactively. *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. Indeed, the *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. *Ring*, 536 U.S. at 607 (observing that the Sixth Amendment jury trial right, however, does

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[3] Under *Teague*, there are two exceptions to the general rule of non-retroactivity. The first exception, relating to substantive rules, requires retroactive application if the new rule places private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Saffle v. Parks*, 494 U.S. 484, 494, 108 L. Ed. 2d 415, 110 S. Ct. 1257 (1990). The second exception is for watershed rules of criminal procedure which implicate the fundamental fairness and accuracy of the criminal proceeding. *Ring* and *Apprendi*, because they are both new procedural rules, not substantive, involve only second exception, not the first.

not turn on the relative rationality, fairness, or efficiency of potential factfinders). Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not "seriously" enhance accuracy. Judicial sentencing is at least as accurate.

FEDERAL & STATE DECISIONS

The Eleventh Circuit has held that *Ring* is not retroactive. In *Turner v. Crosby*, No. 02-14941 (11th Cir. July 29, 2003), the Eleventh Circuit, using a *Teague* framework, determined that *Ring* was a new procedural rule, not a new substantive rule because "*Ring* altered only who decides . . ." The Eleventh Circuit relied on two state supreme court decisions holding that *Ring* was not retroactive and their own prior decision holding that *Apprendi* was not retroactive. *Colwell v. State*, 59 P.3d 463 (Nev. 2002); *State v. Towery*, 64 P.2d 828 (Ariz. 2003); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002). They concluded that the retroactivity analysis of *Apprendi* applies equally to *Ring*.[4] But see

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[4] The Fifth Circuit has noted that it doubts *Ring* is retroactive. *In re Johnson*, 2003 U.S. App. LEXIS 11514, n.1 (5th Cir. June 10, 2003)(declining to reach the issue but questioning whether *Ring* can be retroactive because *Apprendi* is not retroactive in the circuit and noting that "logical consistency" suggests that *Ring* is not retroactive since *Ring* is essentially an application of *Apprendi*).

Summerlin v. Stewart, No. 98-99002, 2003 U.S. App. LEXIS 18111 (9th Cir. September 2, 2003).

Three state supreme courts have held that *Ring* is not retroactive. *State v. Lotter*, 664 N.W.2d 892 (Neb. 2003); *Colwell v. State*, 59 P.3d 463 (Nev. 2002); *State v. Towery*, 64 P.2d 828 (Ariz. 2003); but see *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003).

While only a few courts have addressed the retroactivity of *Ring*, numerous court have addressed the related issue of whether *Apprendi* is retroactive. Two Florida District Courts have held that *Apprendi* is not retroactive. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not apply retroactively to a claim being raised under rule 3.800 based on a *Witt* analysis), *rev. granted*, 837 So.2d 410 (Fla. 2003).[5] All eleven federal circuits that have addressed the issue have held that *Apprendi* is not retroactive.[6] While the

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[5] Briefing is complete and the oral argument has been held in *Hughes*. *Hughes*, SC02-2247. This Court issued an order to stay the proceedings pending resolution of *Hughes* in *Figarola*, SC03-586.

[6] *Sepulveda v. United States*, 2003 WL 212366 (1st Cir. May 29, 2003)(discussed *infra*); *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003)(discussed *infra*); *United States v. Swinton*, 2003 U.S. App. LEXIS 12697 (3d Cir. June 23, 2003)(relying on the Supreme Court's own description of *Apprendi* as procedural and holding *Apprendi* is not retroactive); *United States v.*

Ring Court did not address the retroactivity of their new decision, Justice O'Connor, in her dissent stated that *Ring* was not retroactive. *Ring v. Arizona*, 122 S.Ct. 2428,

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Jenkins, 2003 U.S. App. LEXIS 12265 (3d Cir. June 18, 2003)(holding *Apprendi* is procedural and not retroactive); *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001), *cert. denied*, 535 U.S. 1032, 122 S.Ct. 573, 151 L.Ed.2d 445 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction); *United States v. Brown*, 305 F. 3d 304 (5th Cir. 2002), *cert. denied*, - U.S. -, 123 S. Ct. 1919, 155 L. Ed. 2d 840(2003)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant); *Goode v. United States*, 305 F. 3d 378 (6th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct. 711, 154 L. Ed. 2d 647(2002)(holding *Apprendi* is not a watershed rule citing *Neder v. United States*, 527 U.S. 1, 15 (1999)); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct 541, 154 L. Ed. 2d 334 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not fundamental because it is not even applied on direct appeal unless preserved); *United States v. Moss*, 252 F.3d 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097, 122 S. Ct. 848, 151 L. Ed. 2d 725 (2002)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002), *cert. denied*, 154 L. Ed. 2d 243, 123 S. Ct. 48 (2002)(holding *Apprendi* does not meet either prong of *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied);*United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct. 388, 154 L. Ed. 2d 315 (2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on collateral review).

2449-2450 (2002)(O'Connor, J., dissenting)(noting that capital defendants will be barred from taking advantage of the holding on federal collateral review, citing 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1) and *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such a claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not retroactive). Thus, the United States Supreme Court will not apply *Ring* retroactively either.

MERITS

The Florida Supreme Court rejected a *Ring* challenge to Florida's death penalty statute in *Bottoson v. Moore*, 813 So. 2d 27 (Fla. 2002), *cert. denied*, 122 S. Ct. 2670

(2002), reasoning that the United States Supreme Court had not receded from its prior precedent upholding the constitutionality of Florida's death penalty scheme. Furthermore, the Florida Supreme Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in the wake of *Bottoson* in both direct appeals and collateral cases. *Duest v. State*, 28 Fla. L. Weekly S501 (Fla. June 26, 2003)(rejecting a *Ring* challenge citing *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert denied*, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 154 L. Ed. 2d 556, 123 S. Ct. 657 (2002), in a direct appeal).[7]

Regardless of the view this Court takes of *Ring* and its requirements, *Ring* does not invalidate this death sentence. The death sentence in this case is exempt from the

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[7] The *Ring* Court observed in a footnote that, four states have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. *Ring*, 536 U.S. at 608 n.6 (citing Ala.Code §§ 13A-5-46, 13A-5-47 (1994); Del.Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001); Ind.Code Ann. § 35-50-2-9 (Supp.2001)). The four states are Alabama, Delaware, Florida and Indiana. There is no *Ring* issue in Alabama because their narrowers are imbedded in their capital murder statute. In Alabama, the jury finds the narrowers in the guilt phase. Delaware is no longer a true hybrid state because the jury's verdict is no longer merely advisory. The Delaware General Assembly, in response to *Ring*, made a jury's determination of no aggravating circumstances binding on the trial court. *See* Delaware S.B. 449, 73 Del. Laws c. 423 (barring trial courts from imposing death unless the jury finds at least one aggravating circumstance); *See also Brice v. State*, 815 A.2d 314, 320 (Del. 2003)(detailing legislative history of act). Indiana amended its death penalty law after *Ring* to eliminate jury overrides. See 2002 Ind. Acts 117, § 2 (amending Ind.Code § 35-50-2-9 (2002)).

holding in *Ring*. The trial court found the "under sentence of imprisonment" aggravator. The "under sentence of imprisonment" aggravator, like the prior violent felony aggravator, is a recidivist aggravator. Such aggravators are exempt from the holding in *Ring* and may be found by the judge alone. *Allen v. State*, 28 Fla. L. Weekly S604 (Fla. July 10, 2003)(rejecting a *Ring* challenge where one of the aggravating factors was under a sentence of imprisonment because "[s]uch an aggravator need not be found by the jury").

HARMLESS ERROR AFTER STRIKING AGGRAVATORS

Peterka argues that an appellate court may not conduct a harmless error analysis after striking an aggravator. Pet. at 10-13. Basically, he is claiming that *Ring* overruled *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)(affirming authority of appellate court to reweigh the aggravating and mitigating circumstances after striking an aggravator). It did not. The United States Supreme Court specifically noted that it was not addressing this issue in *Ring*. *Ring*, 122 S.Ct. 2437 at n.4 (noting that Ring did not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator, citing *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). It was *Cabana* that the *Ring* Court questioned, not

Clemons.[8] A capital defendant does not have a Sixth Amendment right to have a jury weigh aggravation and mitigation. So, any reweighing by appellate judges as part of a harmless error analysis does not violate the Sixth Amendment. Moreover, if aggravators are viewed as elements, courts routinely conduct harmless error analysis on elements and therefore, may also conduct it on aggravators. *See Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(holding that the omission of an element is subject to harmless error analysis). *Clemons* is still valid law.

WEIGHING

Peterka also contends that the jury must weigh aggravators against mitigators in the wake of *Ring*. This is an argument that the Sixth Amendment entitles a capital defendant to jury sentencing. Justice Scalia in his concurring opinion specifically noted that *Ring* did not establish jury sentencing. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . ."). Moreover, the weighing process is not a factual determination; rather, the weighing process is a moral or legal judgment. *Ex parte Waldrop v. State*, 2002 WL 31630710 (Ala. November 22, 2002)(rejecting an argument that the jury rather than the judge must do the weighing, because the weighing process is not a factual

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[8] *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment *citing Ford v. Strickland,* 696 F.2d 804, 818 (11th Cir. 1983)).

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE DENIAL OF PETERKA'S MOTION TO SUPPRESS?

Peterka argues that his appellate counsel was ineffective for failing to raise the denial of his motion to suppress on appeal. The State respectfully disagrees. Peterka consented to the search of his duplex. Appellate counsel is not ineffective for failing to raise a search issue where there is a factual finding of consent by the trial court. The standard of review on appeal for factual findings is clearly erroneous. Appellate counsel simply could not win this issue on appeal in the face of this standard and appellate counsel is not ineffective for recognizing this.

Trial counsel filed a motion to suppress arguing that the numerous searches of the residence were conducted without any warrant and without "the permission of any resident or owner of the premises." (T. XI 2018). The trial court held a hearing on the motion to suppress. (T. I, II 1-359). At the hearing, Deputy Harkins, who arrested Peterka at his home, testified that "at that time he gave us permission to search his home" (T. I 17). The deputy told Peterka that he wanted to search for the stolen guns and Peterka said: "you have my permission to search." (T. I 18). The defendant also testified at the hearing. Peterka testified that when the officers ask if they could go into the house to search, he told them that there were no stolen weapons in the ouse and

There was no reason to search the house. (T. XI 2089-2090)The trial court denied the motion to suppress. (T. II 355-359). The trial court denied the motion to suppress finding the search, which yielded the wallet, was conducted “incident to the consent of the defendant.” (T. II 356).

Furthermore, Peterka confessed to the murder and explained that the murder occurred inside their duplex. Peterka also took the deputies to the victim’s body, which was located in a deserted area, negating any possibility of a false confession. Any judge would have issued a search warrant for the duplex under these facts. If appellate counsel managed to convince this Court that Peterka did not consent to the search which yielded the wallet or that the officers did not have the authority to conduct the later search, this Court would have found that the inevitable discovery doctrine applied. The doctrine of inevitable discovery, an exception to the exclusionary rule, allows unlawfully obtained evidence to be admitted at trial if the government can “establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.” *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). This Court would have affirmed the trial court’s denial of the motion to suppress on appeal.

First, appellate counsel raised two issues relating to the motion to suppress on appeal. Appellate counsel has a “professional duty to winnow out weaker arguments

in order to concentrate on key issues." *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Appellate counsel can reasonably decide to raise two issues relating to the motion to suppress rather than three issues. The two issues raised, if won, would have resulted in the suppression of Peterka's confession. Obviously, suppressing the confession was more critical than suppressing some of the physical evidence, as the prosecutor himself noted at the beginning of the motion to suppress hearing. (T. I 6). This is a reasonable appellate strategic decision that is immune from attack.

Appellate counsel is not ineffective for failing to raise Peterka's consent to search. The trial court made a finding that Peterka consented the search of his duplex. Consent is a factual issued which is reviewed on appeal under the clearly erroneous standard of review.[9] This is the most difficult appellate standard of review to meet. *Hiram Walker & Sons, Inc. v. Kirk Line*, 30 F.3d 1370, 1378 n.2 (11th Cir. 1994)(Dubina, J. concurring specially)(defining the clearly erroneous standard as: "To be clearly erroneous, a decision must strike us as more than just maybe or probably

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[9] *United States v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001)(noting that a district court's determination that consent to search was voluntary is a finding of fact, that will not be disturbed on appeal absent clear error); *Jones v. State*, 658 So.2d 178 (Fla. 1st DCA 1995)(stating that consent to search is question of fact and trial court's determination of that question should not be disturbed unless it is clearly erroneous citing *Davis v. State*, 594 So.2d 264, 266 (Fla. 1992)).

wrong; it must, as one member of the court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish" *citing Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). Appellate counsel is not ineffective for failing to raise an issue with this nearly impossible standard of review in the absence of extremely compelling facts. *Rivera v. State*, 2003 WL 22097461 (Fla. Sept. 11, 2003)(concluding that appellate counsel was not ineffective for failing to challenge the trial court's denial of the motion to suppress on appeal because Rivera has not shown how appellate counsel could have effectively argued the motion to suppress according to the applicable standard of review). Collateral counsel provides no such compelling facts, she merely asserts that Peterka testified that he did not consent. She does not even acknowledge the standard of review that appellate counsel was facing. Appellate counsel simply could not win this issue on appeal in the face of a factual finding by the trial court and appellate counsel is not ineffective for recognizing this.

Collateral counsel argues that there was no need to search because the stolen weapons had been recovered but consent to search does not turn on the necessity or the officer's purpose. IB at 26. Officers may request consent to search for no reason. *State v. Kindle*, 782 So. 2d 971, 975 (Fla. 5th DCA 2001)(observing that there is no reason a law enforcement officer cannot ask for consent to search citing *State*

v. Cromatie, 668 So. 2d 1075, 1077 (Fla. 2d DCA 1996)). Nor does the officer's stated purpose limit the scope of consent to guns. Scope of consent involves areas, not objects. Peterka consented to a general search of his house. Collateral counsel also argues that there was conflict in the State's testimony between the officers at the suppression hearing. IB at 25-26. However, conflict in the State's testimony does not negate the trial court's factual finding of consent. *Cf. Donaldson v. State*, 722 So. 2d 177, 182 (Fla. 1998)(rejecting a claim that the convictions cannot stand where the State's primary witnesses offered contradictory evidence because the fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the trier of fact).

While collateral counsel attacks the abandonment theory, she does not discuss any of the other theories of admissibility. IB at 27. The inevitable discovery doctrine was argued by the prosecutor below. (T. II 342-344). Even if appellate counsel agreed with collateral counsel's view of the abandonment theory, he knew that he would have to refute these other theories of admissibility as well to win on appeal under the "right for the wrong reason" rule.[10]

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[10] *Dade County School Bd. v. Radio Station WQBA*, 731 So.2d 638, 644-45 (Fla. 1999)(referring to this principle as the "tipsy coachman" rule and explaining that an appellee, in arguing for the affirmance of a judgment, can present any argument supported by the record even if not expressly asserted in the lower court); *Robertson v. State*, 829 So. 2d 901 (Fla. 2002)(explaining that the tipsy coachman doctrine is limited to

Appellate counsel was not ineffective.

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cases where the record before the trial court supports the alternative theory); *Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 308, 1 L.Ed.2d 314 (1957)(stating that a "successful party in the District Court may sustain its judgment on any ground that finds support in the record."); *Powers v. United States*, 996 F.2d 1121, 1123-24 (11th Cir. 1993)(stating: "[w]e may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below.").

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE PROSECUTOR'S COMMENTS?

Peterka asserts that his appellate counsel was ineffective for failing to raise as an issue numerous of the prosecutor's comments in closing argument. These comments were not objected to by trial counsel. This Court has consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved by objection in the trial court. *Brown v. State*, 846 So.2d 1114, 1127 (Fla. 2003); *Gore v. State*, 846 So.2d 461, 471 (Fla. 2003)(noting that, in the absence of fundamental error, appellate counsel cannot be ineffective for failing to raise an unpreserved claim); *Johnson v. Singletary*, 695 So. 2d 263, 266 (Fla. 1996)(stating: "We have consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.")

Collateral counsel asserts that appellate counsel was ineffective for not raising an unpreserved prosecutorial comment relating to the victim's reputation for peacefulness. IB at 28. The prosecutor in closing stated: "Everybody that told you anything about John Russell as a man as far as whether he fought or not told you he was peaceful and nonviolent." (T. IX 1780). There was no objection. First, one sentence is hardly a "central feature" of the trial. The testimony relating the victim's

reputation for peacefulness was admissible as discussed infra in ISSUE V. Once evidence is admitted without any limitation, it is perfectly proper for the prosecutor to discuss that evidence in closing at any length he chooses.

Collateral counsel also asserts that appellate counsel was ineffective for not raising an unpreserved prosecutorial comment which allegedly shifted the burden to prove the victim's reputation to the defendant. IB at 28. In closing, the prosecutor stated that if the victim "had ever been in any other fights, you would have found out about it in this courtroom. He hasn't ever been in one" (T. IX 1780-1781). Appellate counsel is not ineffective for not briefing an issue that was not preserved and is not fundamental error.

Collateral counsel also asserts that appellate counsel was ineffective for not raising an unpreserved prosecutorial comment which allegedly misled the jury and was not supported by the evidence. IB at 28-29. In closing, the prosecutor made an argument that check was cashed prior to Peterka obtaining the driver's license. (T. IX 1782). There was no objection. Collateral counsel states that the evidence showed that the victim did not learn of the money order being cashed until after he sold Peterka his identification. The jury heard evidence. Appellate counsel is not ineffective for not briefing an issue that was not preserved.

Collateral counsel also asserts that appellate counsel was ineffective for not

raising an unpreserved prosecutorial comment which allegedly amounted to a prosecutorial expertise argument. IB at 29. In closing, the prosecutor said:

> "There is not just one point. I've told you all of them. I've done everything I can do. I've showed you all the evidence that I can bring in here to you. It proves Dan Peterka is guilty beyond any reasonable doubt. The evidence casts away any reasonable doubt.

(T. IX 1798). There was no objection. This comment does not in any way, shape, or form imply there is additional evidence in the case. Far from it. The comment says that the prosecutor showed the jury all the evidence he possessed. This is not a prosecutorial expertise argument. This comment was part of his argument that there is no reasonable doubt in the case. Appellate counsel is not ineffective for not briefing an issue that was not preserved and is meritless.

The prosecutor comment on the defendant not burying the victim. (R. 1797). This issue was not preserved. While graphic, the prosecutor's comments are not fundamental error. Appellate counsel is not ineffective for not briefing an issue that was not preserved and is not fundamental error.

Collateral counsel asserts appellate counsel was ineffective for failing to raise the prosecutor referring to Peterka as a liar and a thief as an issue on appeal. IB at 30. The prosecutor repeatedly referred to Peterka as a liar and a thief. (T. IX 1779, 1780, 1782). The prosecutor referred to his prior convictions for thievery as support for this characterization. (T. IX 1779). The prosecutor also listed all of the instances of

Peterka not telling the truth. (T. IX 1780) Trial counsel did not object. The prosecutor may call the defendant a liar if such a characterization is supported by the evidence. *Pino v. State*, 776 So.2d 1081 (Fla. 3d DCA 2001)(finding prosecutor's characterizations of the defendant as a liar to be supported by the record); *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1028-29 (Fla. 2000)(concluding that it is not improper for counsel to state during closing argument that a witness "lied" or is a "liar," provided such characterizations are supported by the record, reasoning that if the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence). Appellate counsel is not ineffective for not briefing an issue that was not preserved and was supported by the record and caselaw.

ISSUE IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE ADMISSIBILITY OF A GRUESOME PHOTOGRAPH AND THE VICTIM'S SKULL?

Peterka asserts that his appellate counsel was ineffective for failing to brief the issue of the admissibility of one gruesome photograph and the victim's skull. This issue was raised in the direct appeal. This Court ruled that the admission of the single photograph was relevant and furthermore, if error, it was harmless error.[11] Specifically, this Court held:

> Peterka argues that the trial court also erred in admitting a photograph of the victim's decomposed skull. During the medical examiner's testimony, defense counsel objected to the admission of photographs of the victim's decomposed body as highly prejudicial. Defense counsel and the prosecutor agreed to allow the medical examiner to use the victim's cleaned skull to explain the victim's wound. The trial court granted the defense motion to deny admission of the photographs. However, at the end of its case-in-chief, the State again sought to introduce photographs of the victim's skull on the basis that the photographs were relevant in light of the expert's testimony regarding the difficulty in determining the presence of gunpowder on decomposed tissue. Defense counsel again objected to the admission of the photographs because of their gruesome nature. The trial court sustained the defense counsel's objections as to four photographs, but admitted one photograph. Defense counsel also argued that the photograph did not show the body in the same condition as when the police found it because the medical examiner had removed tissue from the skull. The trial court denied the motion and admitted the photograph of the victim's decomposed skull into evidence.
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> On appeal, Peterka argues that the admission of the photograph

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[11] Only a single photograph of the skull was admitted. (T. IX 1702).

> violated his Sixth Amendment right to confrontation as he had no opportunity to cross-examine the medical examiner regarding the photograph. He also argues that any relevance of the photograph was outweighed by its highly prejudicial nature. Peterka did not specifically preserve the Sixth Amendment issue below. *Bertolotti v. State*, 565 So.2d 1343, 1345 (Fla. 1990). As to Peterka's relevance argument, we find the photograph relevant to the medical examiner's testimony that not enough tissue remained on the skull to determine the proximity of the gun to the victim's head. Thus, the trial court did not abuse its discretion in admitting the photograph into evidence. *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Moreover, even if we found that the trial court erred in admitting the photograph into evidence, the error would be harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

Peterka, 640 So. 2d at 69-70.

If appellate counsel raises an issue, failing to convince this Court to rule in his favor is not ineffective assistance of counsel.[12] Appellate counsel cannot be ineffective for failing to brief an issue that he, in fact, briefed. There cannot be no prejudice under this scenario because it is clear that petitioner would not have been granted relief on appeal if appellate counsel had raised the issue, because he did raise

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[12] *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000)(rejecting a claim of ineffectiveness of appellate counsel for not convincing the Court to rule in his favor on two issues actually raised on direct appeal and concluding that if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990)(finding that if appellate counsel raises an issue, failing to convince this Court to rule in an appellant’s favor is not ineffective performance).

it and lost. Appellate counsel raised the admissibility of the photograph and therefore, cannot be ineffective.

While appellate counsel did not directly raise the issue of the actual skull, this was because appellate counsel chose to use the fact that the victim's actual skull was used as a demonstrative aid to support his argument of just how prejudicial and gruesome the photograph of the skull was. Appellate counsel explained that the trial court gave the defendant the choice of the skull or the photograph and "faced with that choice, he selected the skull, which indicates how prejudicial he believed the picture to be." Direct appeal IB at 47. Appellate counsel referred to a "certain queasiness in holding up the victim's skull . . ." He even quoted Shakespeare. Appellate counsel did not miss the fact that the skull was used or ignore it; rather, wove it into what he thought was the better issue. This is an appellate strategical decision that is clear from the face of the brief. *State v. Williams*, 797 So.2d 1235, 1239 (Fla. 2001)(finding that counsel's strategy was so obvious from the record that no evidentiary hearing was necessary citing *McNeal v. Wainwright*, 722 F.2d 674, 676 (11th Cir. 1984)).

Furthermore, the issue of the victim's skull was not preserved. Indeed, it was positively waived. Trial counsel did not "quite" know what his reaction to the actual skull was. (T. VII 1204). Trial counsel did state he had "a little bit of a problem with it", but he agreed that the skull was "less grotesque" and "less offensive" than the

photographs. (T. VII 1204, 1206). Trial counsel consulted with Peterka in this matter. (T. VII 1206). This Court read the record as establishing trial counsel's agreement to the use of the skull. *Peterka*, 640 So. 2d at 69 (stating that "[d]efense counsel and the prosecutor agreed to allow the medical examiner to use the victim's cleaned skull to explain the victim's wound."). Peterka and trial counsel waived the issue by agreeing to the skull's admissibility. It is not ineffectiveness of appellate counsel to not brief an issue that was not preserved, much less an issue that was waived. *Rivera v. State*, 2003 Fla. LEXIS 1535 (Fla. September 11, 2003)(finding no ineffectiveness of appellate counsel for failing to raise the issue of the admissibility of photographs because the issue was not preserved); *Johnson v. Singletary*, 695 So. 2d 263, 266 (Fla. 1996)(stating: "We have consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object."). Indeed, even if this Court found the admissibility of the skull to be fundamental error, it would affirm based on the waiver. *Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991)(affirming where the trial court would have otherwise committed fundamental error because the defendant had requested the jury instruction that was fundamental error).

Nor is there any prejudice. Other jurisdictions have affirmed the use of the victim's skull. *State v. Pike*, 978 S.W.2d 904, 925 (Tenn. 1998)(finding the probative

value from the medical examiner's use of the victim's skull outweighed any prejudice because the skull was "no more prejudicial or gruesome than a model diagram would have been" where the skull had been thoroughly cleansed); *Crain v. State*, 736 N.E.2d 1223, 1234 (Ind. 2000)(finding no abuse of discretion where the victim's skull was "neither particularly gruesome nor ominous" but preferring other more conventional alternatives); *Hilbish v. State*, 891 P.2d 841, 849-850 (Alaska Ct. App. 1995)(finding no abuse of discretion in the trial court finding that the probative value of the victim's skull, utilized by the State to assist the jury in understanding the precise location of the gunshot wounds, outweighed any prejudice, reasoning that the skull was not particularly gruesome, arguably less gruesome than available photographs might have been, because it had been cleaned of all tissue and was contained in a sealed and odorless plastic bag).

If the *Peterka* Court did not grant relief on the photograph, it certainly would not have on the skull. The defendant was given a choice between the photograph and the skull and chose the skull. While appellate counsel obviously viewed this as a Hobson's choice, if the *Peterka* Court did not grant relief on the option the defendant objected to the most, the photograph, it would not have granted relief on the option the defendant objected to the least, the skull. Thus, there is no prejudice either.

Peterka also asserts his appellate counsel was ineffective for failing to raise the

admissibility of a photograph of the victim, wearing a tee-shirt, which showed his decomposing body. IB at 31 (T. VI 1156-1159). At trial, the victim's cousin's husband, Mr. Trently, who had identified the body, testified that the victim often wore a black tee-shirt with a Jack Daniels logo in it. (T. VI 1157). Trial counsel objected due the extreme state of decomposition of the body depicted in the photograph. (T. VI 1158). The prosecutor responded that trial counsel had not stipulated that the body was the victim's and indeed was going to contest the identity of the body. (T. VI 1159). Defense counsel did not dispute the prosecutor's representation that he was going to dispute identity.

This Court has consistently upheld the admission of gruesome photographs where they were relevant to prove identity of the victim.[13] While collateral counsel believes that the State sufficiently proved identity through Dr. Petrey's testimony, the State has a beyond a reasonable doubt standard of proof. IB at 32. As this Court has

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[13] *Wilson v. State*, 436 So. 2d 908 (Fla. 1983)(finding no abuse of discretion in the admission of autopsy photographs where relevant to prove identity even where the identities of the victims had previously been established by other photographs); *Jackson v. State*, 545 So. 2d 260, 265 (Fla. 1989)(finding no error in the admission of photographs of victims' charred remains admissible where they were relevant to prove identity); *Foster v. State*, 369 So. 2d 928, 930 (Fla. 1979)(concluding that photographs which were "indeed gruesome and offensive" were admissible to establish identity even where there was no question as to the identity of the victim because a defendant cannot, by stipulating as to the identity of a victim, relieve the State of its burden of proof beyond a reasonable doubt.).

explained, "the prosecution with its burden of persuasion needs evidentiary depth" to prove its case. *Brown v. State*, 719 So.2d 882, 885 (Fla. 1998)(quoting *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)). Trial counsel disputed the identity of the victim. The State was entitled to prove identity through both expert and lay testimony. A juror may have been more comfortable with non-scientific testimony. Another juror may have been uncomfortable with the fact that forensic odontology is a specialty obtained by experience rather than educational degree or with this particular expert's qualifications. (T. VII 1260,1261). Nor was there any testimony about the reliability of identification through dental records other than a statement that it was a "recognized manner of identifying individuals" and an implication that the military uses it. (T. VII 1260-1261). It is hardly evidentiary overkill for the State to prove identity through both lay and expert testimony especially a fact as important as the identity of the body.

There is no deficient performance. Appellate counsel is not ineffective for failing to raise the issue in a case where trial counsel was disputing the identity of the body. For this issue to have any merit, trial counsel would have had to be willing to stipulate to identity. Appellate counsel is not ineffective for recognizing, in the absence of a stipulation as to identity, the issue had little chance of success on appeal. Furthermore, appellate counsel is not ineffective for realizing that challenges to the

admissibility of photographs rarely succeed on appeal and pursuing other issues with more likelihood of success. Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Appellate counsel can reasonably decide to raise only one issue relating to the admissibility of gruesome photographs and then choose the photograph issue that is a better posture. The photograph issue actually raised by appellate counsel was in the better posture because there had been an understanding at trial that the skull would be used in the place of the skull photograph. Collateral counsel does not even attempt to explore why the photograph issue actually raised by appellate counsel in the direct appeal was not the better issue. Surely, appellate counsel is not ineffective for failing to raise two gruesome photograph issues. One such issue is sufficient. Often, more is not better; it is just more.

Nor is there any prejudice. Just as the *Peterka* Court did not reverse based on the other photograph, it would not have reversed based on this photograph where the defendant disputed the victim's identity. Just as the *Peterka* Court found the other photograph relevant and admissible, it would have found this one relevant and admissible to prove identity. Appellate counsel was not ineffective.

ISSUE V

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE OF THE ADMISSIBILITY OF THE VICTIM'S CHARACTER FOR PEACEFULNESS?

Peterka argues that appellate counsel was ineffective for not raising the issue of the admissibility of evidence regarding the victim's non-violent character. Peterka also asserts that appellate counsel was ineffective for not raising the issue of the admissibility of this evidence in the State's case-in-chief rather than in rebuttal. This evidence was admissible. The State was entitled to rebut Peterka's claim that the victim was the first aggressor. Appellate counsel is not deficient for failing to raise a meritless issue. Nor is there any prejudice. This Court would not have granted relief on this issue. Furthermore, any error in the timing of the admission of this evidence would have been deemed harmless by this Court. Appellate counsel is not ineffective for declining to raise an issue, that even if found to be error, would also be found to be harmless.

The evidence of the victim's peacefulness is admissible to rebut a claim that the victim was the first aggressor. The character evidence statute, § 90.404, Fla. Stat. (1989), provided, in pertinent part:

> (1) Character evidence generally.--Evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion, except:

(b) Character of victim.--

2. Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

When a criminal defendant alleges self-defense, evidence of the victim's character trait of violence may be admissible for two purposes. First, the evidence may be offered on the issue of who was the aggressor. *Charles W. Ehrhardt, Florida Evidence*, § 404.6 (ed. 2003)(citing *Fine v. State*, 70 Fla. 412, 70 So. 379 (1915)). The evidence of the defendant that the victim of the homicide was the aggressor, opens the door to evidence of the victim's peacefulness offered by the prosecution. *Charles W. Ehrhardt, Florida Evidence*, § 404.6 (ed. 2003)(citing 3 *Weinstein, Evidence* § 404[06]). For this provision to apply, it is not necessary that character witnesses have been called; any testimony that the homicide victim was the aggressor permits the prosecution to introduce the reputation testimony. *Charles W. Ehrhardt, Florida Evidence*, § 404.6 (ed. 2003)(citing 22 *Wright & Graham: Federal Practice & Procedure: Evidence* pp. 406-410). The federal rule of Evidence, rule 404, is similar to section 90.404(1)(b). *Charles W. Ehrhardt*, Florida Evidence, § 404.6 (ed. 2003)

At trial, the victim's cousin's husband, Mr. Trently, testified that the victim had a reputation for peacefulness in the community. (T. VI 1165-1169); See also *Peterka*, 640 So.2d at 69.

At trial, the victim's cousin, Mrs. Trently, also testified to the victim's reputation as being one of "peaceful and nonviolence." (T. VI 1183).

Peterka placed in issue who was the first aggressor when he asserted in his confession that the victim started the physical altercation. This State was entitled to rebut this assertion. While collateral counsel attempts to recharacterize Peterka's defense as neither self-defense nor an accident, regardless of the label, Peterka claimed the victim started the fight and therefore, the victim's character was admissible. Contrary to collateral counsel's assertion, evidence of a struggle between two people who are both, in Peterka's words, "grabbing" and "struggling" for a gun, is the equivalent to a claim of self-defense. IB at 38. This Court characterized Peterka's defense as: "Peterka asserted that he accidentally shot the victim during a fight instigated by the victim." *Peterka*, 640 So.2d at 69.

Appellate counsel correctly determined that, under this Court's caselaw, the victim's reputation for peacefulness is admissible when the defendant claims that the victim was the first aggressor which Peterka did. Furthermore, because this Court would have found the character evidence to be admissible if raised on appeal, there is no prejudice.

Additionally, any error in the timing of the introduction of this evidence would have been harmless. Even if the concept of anticipatory rehabilitation does not apply

and the State should not have introduced this evidence until later in its rebuttal case, the error was definitely harmless. Whether the jury heard the victim's character in the State's case-in-chief or in rebuttal is without significance. Either way the jury would have heard this evidence. There can be no prejudice from a completely harmless error and appellate counsel is not ineffective for recognizing this. *Spencer v. State*, 842 So. 2d 52, 76 (Fla. 2003)(holding that a petition cannot show prejudice where appellate counsel failed to raise an error that this Court determined to be harmless).

Peterka's reliance on *Jacob v. State*, 546 So. 2d 113 (Fla. 3d DCA 1989), is misplaced. The Third District explained that even if anticipatory rehabilitation conformed to the rules of evidence, it would not be applicable to the particular case because the defendant never attacked the witness's character. Thus, the *Jacob* Court found the evidence to be inadmissible. The *Jacob* Court did not address whether evidence that was properly admissible, but not until the State's rebuttal, would be harmless merely if introduced too early.

Here, unlike *Jacob*, the evidence was admissible because the defendant made it admissible by claiming self-defense. Here, the only issue would be a pure timing issue and *Jacob* did not address that issue.

ISSUE VI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE JUDGE'S COMMENTS AND JURY INSTRUCTION REGARDING THE AGGRAVATING CIRCUMSTANCES?

Peterka asserts that his appellate counsel was ineffective for failing to raise numerous jury instruction issues. The State respectfully disagrees. Many of the issues were not preserved in the trial court. Appellate counsel is not ineffective for failing to raise unpreserved errors. *Brown v. State*, 846 So.2d 1114, 1127 (Fla. 2003); *Gore v. State*, 846 So.2d 461, 471 (Fla. 2003)(noting that, in the absence of fundamental error, appellate counsel cannot be ineffective for failing to raise an unpreserved claim); *Johnson v. Singletary*, 695 So. 2d 263, 266 (Fla. 1996)(stating: "We have consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.")

Collateral counsel merely quotes the judge's comments and asserts they are error without any argument detailing what she believes is wrong with the comments. IB at 39-40. This is not sufficient to raise an issue on appeal.[14] Indeed, the State is

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[14]*Lawrence v. State*, 831 So.2d 121, 133 (Fla. 2002)(finding issue insufficiently briefed where issue was raised in a single sentence); *Shere v. State*, 742 So.2d 215, 217 n. 6 (Fla. 1999)(finding issue insufficiently presented for review where appellate counsel did not present any argument or allege on what grounds the trial court erred in denying the claims); *State v. Mitchell*, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998)(holding issues raised in appellate brief which contain no argument are

hard pressed to respond to the claim without knowing the basis of the alleged error other than to explain the context of the comments. The prosecutor was going to list the actual statutory aggravators during his individual voir dire of actual juror King. (T. II 397; jury list - T. 1093). Trial counsel objected because some of the aggravators would not be applicable to this case. (T. II 397). The trial court sustained the objection. (T. II 397). The prosecutor then sought to limit his question to the aggravators that the State would be seeking in the case. (T. II 397). The trial court prohibited this as well. (T. II 398). He told the prosecutor to define aggravators in his questioning as "circumstances above and beyond" and not to specifically itemize them for the juror. (T. II 398). There was no objection. The trial court's comments were part and parcel of the trial court sustaining trial counsel's objection to the prosecutor's comments. Obviously, trial counsel was pleased with this result.

The trial court's characterization of aggravating circumstances as those "above and beyond normal" is perfectly proper. (T. II 398). This is a colloquial expression, not error, much less a violation of the Eighth Amendment. Moreover, any problem, relating to the trial court's statements regarding aggravating circumstance during jury selection, was cured by the final jury instruction covering aggravating circumstances in detail. No juror would have been left with the nebulous concept of aggravators as

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deemed abandoned).

beyond normal circumstances by the start of penalty phase deliberations. Appellate counsel was not ineffective for failing to raise this issues which was not preserved, not error, and which was clarified by the final jury instructions on aggravators.

DOUBLING OF AGGRAVATORS

Collateral counsel asserts that appellate counsel was ineffective for failing to raise the improper doubling of the avoid arrest aggravator and the disrupt or hinder law enforcement aggravator because both these aggravators were based on a single aspect of the crime which was Peterka's status as a fugitive. IB at 40. The sentencing order found both aggravators to be proven. (T XI 2077-2078).

However, appellate counsel cannot be ineffective for failing to raise an issue that, he, in fact, raise and won. This issue was raised on appeal and this Court agreed that there was improper doubling just as appellate counsel argued in his brief. The *Peterka* Court found:

> Although the court properly found the avoid arrest circumstance, it erred in finding the hinder law enforcement circumstance to be a separate aggravating factor. The sentencing order shows that the trial court used the same features of the case to support both aggravating circumstances, which constitutes an impermissible "doubling" of aggravating circumstances. *Bello v. State*, 547 So.2d 914 (Fla. 1989). The trial court should have merged these two aggravating circumstances.

Peterka, 640 So.2d at 71. However, this Court also found the error to be harmless. *Peterka*, 640 So.2d at 71 (finding the trial court's errors in considering the pecuniary

gain circumstance and "doubling" the avoiding lawful arrest and hindering law enforcement circumstances to be harmless). The *Peterka* Court stated that under the facts of this case, we find that the trial court would have imposed the same sentence, and thus, the error in the sentencing order is harmless. *Peterka*, 640 So.2d at 71-72.

VAGUE JURY INSTRUCTION ON AGGRAVATORS

Collateral counsel asserts that appellate counsel was ineffective for failing to raise the constitutionality of the avoid arrest and the pecuniary gain aggravators. She asserts that the avoid arrest and the pecuniary gain aggravators violate *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)[15], and *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). Collateral counsel also asserts that appellate counsel was ineffective for failing to raise the constitutionally of the CCP jury instruction. She asserts the CCP instruction violated *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994).

Trial counsel filed a motion to dismiss the CCP jury instruction as unconstitutionally vague and overbroad and also argued that the CCP instruction was vague in a general motion to declare the death penalty statute unconstitutional. (T. XI

[15] *Espinosa* concerned the HAC instruction which was not given in this case and therefore, *Espinosa* has no direct application to this case.

1961, 1999). However, trial counsel does not seem to have filed such a motion challenging either the avoid arrest or the pecuniary gain aggravator.

The pecuniary gain aggravator has been upheld by this Court. *Kelley v. Dugger*, 597 So. 2d 262, 265 (Fla. 1992)(rejecting a claim that pecuniary gain aggravator is unconstitutionally vague). The avoid arrest aggravator has been upheld by this Court.[16] This Court has also rejected an ineffective assistance of appellate counsel claim for failing to challenge the constitutionality of the avoid arrest aggravator. *Sweet v. Moore*, 822 So. 2d 1269, 1275 (Fla. 2002). Appellate counsel is not ineffective for failing to raise meritless issues.

Sochor was decided in 1992. *Jackson* was decided in 1994. The initial brief was served on December 4, 1990. Appellate counsel cannot be ineffective for failing to anticipate changes in the law surrounding aggravators. *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003)(observing that this Court has consistently held that neither trial nor appellate counsel can be held ineffective for failing to anticipate changes in the law citing *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992) and *Stevens v. State,* 552 So.

[16] *Griffin v. State*, 2003 Fla. LEXIS 1621 (Fla. September 25, 2003); *Davis v. State*, 698 So. 2d 1182, 1192 (Fla. 1997)(rejecting an argument that this Court's construction of avoid arrest aggravator be incorporated into jury instruction because standard jury instruction was legally adequate); *Whitton v. State*, 649 So. 2d 861, 867 n.10 (Fla. 1994)(concluding that standard jury instruction for avoid arrest aggravator was not vague and did not require a limiting instruction in order to make the aggravator constitutionally sound).

2d 1082, 1085 (Fla. 1989)). Nor is appellate counsel required to be innovative. *Steinhorst v. Wainwright*, 477 So.2d 537 (Fla. 1985)(noting that the failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel); *Pitts v. Cook*, 923 F.2d 1568, 1574 (11th Cir. 1991)(noting that lawyers rarely, if ever, are required to be innovative to be effective). Appellate counsel was not ineffective.

ISSUE VII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY PRESENT THE ISSUE OF THE ADMISSIBILITY OF THE HEARSAY STATEMENT THAT PETERKA WAS "ARMED AND DANGEROUS"?

Peterka argues that appellate counsel inadequately presented the issue of the admission of the hearsay statement that Peterka was "armed and dangerous". Peterka argues that although appellate counsel raised the admission of the hearsay statement that Peterka was armed and dangerous, appellate counsel did not do it "adequately". If appellate counsel raises an issue, failing to convince this Court to rule in his favor is not ineffective assistance of counsel.[17] A contention that the issue was inadequately argued merely expresses dissatisfaction with the outcome of the appeal. *Routly v. Wainwright*, 502 So.2d 901, 903 (Fla. 1987)(observing petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner" quoting

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[17] *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000)(rejecting an claim of ineffectiveness of appellate counsel for not convincing the Court to rule in his favor on two issues actually raised on direct appeal and concluding that if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990)(finding that if appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance).

Steinhorst v. Wainwright, 477 So.2d 537, 540 (Fla. 1985)). Furthermore, while claiming ineffectiveness for inadequately arguing the issue, collateral counsel is basically making the exact same argument that appellate counsel made in the direct appeal. (Compare direct appeal IB at 36-37 with habeas petition at 45). Both appellate and collateral counsel argued that the officer acting in the manner he did had no relevance to Peterka's actions. Both argued that the officer's ruse was not relevant to the main issue of Peterka's premeditation. Both appellate counsel and collateral counsel argued that because the murder occurred before the officer's actions, the officer's later actions and thoughts were not relevant to the previous murder. Collateral counsel does not identify what critical arguments were not made or what critical case was not cited by appellate counsel in the direct appeal. There can be no ineffectiveness of appellate counsel claim for failing to make certain arguments without identifying with particularity what the omitted arguments should have been. Such a claim is insufficiently pled.

Such a claim is also barred by the law of the case doctrine as well. *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002)(holding a claim that has been resolved in a previous review of the case is barred as "the law of the case" citing *Mills v. State*, 603 So. 2d 482, 486 (Fla. 1992)). Collateral counsel is relitigating the same issue raised and ruled on in the direct appeal. This Court held that the testimony was relevant and

that the limiting instruction given eliminated any prejudice. *Peterka*, 640 So. 2d at 68. Collateral counsel provides no reason to revisit the issue. The main case she cites, *State v. Baird*, 572 So. 2d 904 (Fla. 1991), was also cited by the *Peterka* Court in its discussion of this issue. The same arguments were made and the same case was considered in the direct appeal. *Hodges v. Marion County*, 774 So. 2d 950 (Fla. 5th DCA 2001)(holding that an argument that the issue was decided incorrectly in the first appeal does not establish the manifest injustice exception to the law of the case doctrine). It is improper to argue in a habeas petition a variant of a claim previously decided and collateral counsel provides no reason for doing so. *Porter v. Crosby*, 840 So.2d 981, 984 (Fla. 2003)(citing *Jones v. Moore*, 794 So.2d 579, 586 (Fla. 2001)).

ISSUE VIII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY PRESENT THE ISSUE OF THE ADMISSIBILITY OF THE TESTIMONY THAT THE VICTIM WAS AFRAID OF PETERKA'S GUN?

Peterka argues that appellate counsel inadequately presented the issue of the admissibility of the testimony that the victim was afraid of Peterka and his gun. Peterka argues that although appellate counsel raised the issue, appellate counsel did not do it "adequately". If appellate counsel raises an issue, failing to convince this Court to rule in his favor is not ineffective assistance of counsel.[18] A contention that the issue was inadequately argued merely expresses dissatisfaction with the outcome of the appeal. *Routly v. Wainwright*, 502 So.2d 901, 903 (Fla. 1987)(observing petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner" quoting *Steinhorst v. Wainwright*, 477 So.2d 537, 540 (Fla.

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[18] *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000)(rejecting a claim of ineffectiveness of appellate counsel for not convincing the Court to rule in his favor on two issues actually raised on direct appeal and concluding that if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990)(finding that if appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance).

1985)). Furthermore, while claiming ineffectiveness for inadequately arguing the issue, collateral counsel is basically making the exact same argument that appellate counsel made in the direct appeal. (Compare direct appeal IB at 39-44 with habeas petition at 46-50). Both appellate counsel and collateral counsel argued that the accident exception to the prohibition against the admission of a victim's state of mind requires a particular type of accident. They both argued that a defense that there was an unintentional killing during a struggle is not a true accident defense. While the argument makes no sense, which, no doubt, is why this Court rejected the argument in the direct appeal and properly labeled the defense an accident defense, the point is that this same argument was made by appellate counsel in the direct appeal. Appellate counsel cited *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973) in his direct appeal brief just like collateral counsel does in this habeas. Collateral counsel does not identify what critical arguments were not made or what critical case was not cited by appellate counsel in the direct appeal. There can be no ineffectiveness of appellate counsel claim for failing to make certain arguments without identifying with particularity what the omitted arguments should have been. Such a claim is insufficiently pled.

Such a claim is also barred by the law of the case doctrine as well. *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002)(holding a claim that has been resolved in a previous review of the case is barred as "the law of the case" citing *Mills v. State*, 603

So. 2d 482, 486 (Fla. 1992)). Collateral counsel is relitigating the same issue raised and ruled on in the direct appeal. This Court held that this testimony was properly admitted in the direct appeal. The *Peterka* Court reasoned that, while normally a victim's statement that he was afraid of the defendant are not admissible because the victim's state of mind is not relevant, when the defense is that the murder was accidental then the testimony becomes relevant and because Peterka's defense was that the shooting was accidental, the testimony was admissible. *Peterka*, 640 So. 2d at 69. Collateral counsel provides no reason to revisit the issue. The same arguments were made and the same cases were considered in the direct appeal. *Hodges v. Marion County*, 774 So. 2d 950 (Fla. 5th DCA 2001)(holding that an argument that the issue was decided incorrectly in the first appeal does not establish the manifest injustice exception to the law of the case doctrine). It is improper to argue in a habeas petition a variant of a claim previously decided and collateral counsel provides no reason for doing so. *Porter v. Crosby*, 840 So.2d 981, 984 (Fla. 2003)(citing *Jones v. Moore*, 794 So.2d 579, 586 (Fla. 2001)).

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to Linda McDermott Esq., McClain & McDermott, 497 Stonehouse Road, Tallahassee, FL 32301 this 6th day of October, 2003.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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